IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 341

INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 31, AFL-CIO,

*Petitioner,*

vs.

ROSS M. MADDEN, REGIONAL DIRECTOR OF THE THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BERNARD M. MAMET,

*Attorney for Petitioner.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

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**No.**

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INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 41, AFL-CIO,

*Petitioner,*

vs.

ROSS M. MADDEN, REGIONAL DIRECTOR OF THE THIRTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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International Hod Carriers' Building and Common Laborers' Union of America, Local 41, AFL-CIO, prays that a writ of certiarori issue to review a judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on May 11, 1960.

## OPINION BELOW.

The opinion of the Court of Appeals is reported at ... F. 2d ..... and is presented in its entirety in Appendix A hereof (Pages 1 through 10). The order of the District Court granting the temporary injunction as well as its order entering final judgment, is printed in its entirety in Appendix B hereof (Pages 11 through 12).

## JURISDICTION.

The judgment order of the Court of Appeals appearing in Appendix A hereof was entered on May 11, 1960. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1).

## QUESTIONS PRESENTED.

1. When the National Labor Relations Board brings suit in a Federal District Court, does it assume the same status as a private citizen and as such expose itself to production and disclosure? Or, by the adoption of its own rule concerning privilege, can it secure an immunity from disclosure greater than that of a private citizen and thus avoid having its agents testify?

2. When the National Labor Relations Board brings an action in the Federal District Court for an injunction under Section 10 (l) of the National Labor Relations Act must it not as a condition precedent thereto follow the requirements of the said Act and the Board's own Statements of Procedure? If so, is not an inquiry by a respondent into whether or not the Board has, in fact, complied with the conditions precedent appropriate?

3. In seeking a Section 10 (l) injunction is not the Board required to demonstrate reasonable cause as regards the existence of *inducement* for the **object** proscribed under the specific section of the Act claimed violated *or* is it sufficient to show only that peaceful picketing occurred and that the same induced?

## STATUTE INVOLVED.

The Statute involved herein is the National Labor Relations Act, as amended hereinafter referred to as the "Act", (61 Stat. 136, 29 U.S.C. 151 *et seq.*). The pertinent provisions of same as well as the Statements of Procedure and Rules and Regulations of the National Labor Relations Board are set forth in the following Statement.

## STATEMENT.

The Regional Director of the Thirteenth Region of the Board sought and secured an injunction under Section 10 (l) of the Act enjoining peaceful picketing under the claim that the same was for an object proscribed by Section 8 (b) (4) (C) of the Act. The Seventh Circuit affirmed.[1]

[1] Pursuant to the provisions of Section 10 (l) of the Act "appropriate injunctive relief" remains in effect "pending the final adjudication of the Board." The injunction order entered on June 5, 1959, thus remains in effect even though a Trial Examiner of the Board has found that the peaceful picketing did not violate the Act in that it was not for an object proscribed by the Act. Obviously, an Intermediate Report of a Trial Examiner is not a "final adjudication of the Board" and while admittedly the Intermediate Report was not part of the Record in the Court below, it is submitted that this Court may take judicial notice of a decision of an administrative agency. *Boules* v. *U. S.*, 319 U. S.

**The Initial Facts**

Approximately five months prior to the filing of the instant injunction suit, the Board filed a virtually identical petition in the same court seeking to enjoin the instant Petitioner from engaging in peaceful picketing at the same construction site under an identical set of facts (S..App. 1, Tr. 61-62).[2] The parties entered into a stipulation to dismiss the original Petition for Injunction at the request of the Board, it having admitted that there was a question as to whether or not it had followed its own Statements of Procedure. Apart from the dismissal of the original injunction suit, the charge upon which the original petition was based continued to be processed by the Board and was dismissed by the Thirteenth Region on March 9, 1959, (App. 237-238) and such dismissal was sustained by General Counsel of the Board on April 6, 1959, because of "insufficient evi-

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33 (1943). Said Intermediate Report is reprinted herein in its entirety in Appendix C hereof (Pages 14 through 22). The Regional Office of the Board has filed exceptions to the Intermediate Report. Reference is made herein to the said Intermediate Report only to demonstrate that while a respondent in a National Labor Relations Board case may ultimately be vindicated — fourteen months have already elapsed with the injunction order still in effect—the result of absolution is indeed questionable when picketing involving a construction site has been enjoined.

[2] The printed Appendix filed with the Court of Appeals has been submitted herewith. References to same will appear as "App." Additionally, additional certified portions of the Transcript not heretofore printed were submitted in duplicated form and the page references to the same will appear in here as "S. App." indicating Supplemental Appendix and will also carry the page number of the original Transcript, "Tr."

dence of violation" (App. 147)—all prior to the filing of the instant Petition for Injunction.

**Refiling of Charges and the Instant Injunction Suit**

New charges covering the identical factual situation were filed on April 1, 1959. When apprised of same, counsel for the instant Petitioner reminded the Board in writing (App. 233) that the Board had already determined that picketing was legal; that there was no violence and that this Petitioner was "unfamiliar with any occurrence which might alter the current situation." Counsel for Petitioner requested a meeting with Board representatives so that he might acquaint himself with additional facts which might have occurred and stated that he would be prepared to submit whatever information the Board might find necessary or desirable. Additional attempts were made to secure information of the Board and to offer witnesses for interview by the Board, but without avail (App. 232). The Board filed suit to enjoin[3]

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[3]The applicable provisions of Section 10 (l) of the Act under which suit was brought are as follows: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C) of Section 8 (b), the *preliminary investigation* of such charge shall be made forthwith * * * if after such *investigation* the officer or regional attorney to whom the matter may be referred has *reasonable cause* to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board petition any district court of the United States * * * for appropriate injunctive relief. Upon filing of any such petition * * * any person involved in the charge * * * shall be given an opportunity to appear by counsel and *present any relevant testimony.*" (Italics supplied.)

**The Attempted Inquiry.**

As part of its case in the defense of the injunction suit Petitioner subpoenaed four representatives of the Board and had issued a subpoena *duces tecum* directed against the Regional Director.[4] As regards the subpoena *duces tecum*, the Regional Director, although taking the stand, testified that he had not brought with him any of the books and records requested in the subpoena and was not prepared to testify relative to same (Ap., 121). He based his refusal to testify upon the Board's then Rule 102.95[5] which pro-

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[4] Petitioner took the only course open to it in its attempt to not only question an adverse party but additionally to ascertain whether Section 10 (1) of the Act as well as Sections 101.4 and 101.7 of the Board's Statements of Procedure had been complied with as conditions precedent to the bringing of the action. Petitioner would have preferred to avail itself of the deposition and discovery Sections of the Rules of Civil Procedure (Rule 26, *et seq.*) but was unable to do so because of "emergency" claimed by the Board. Sections 101.4 and 101.7 of the Statements of Procedure then in effect are set forth in Appendix D, hereof (Pages 23 through 24).

[5] Section 102.95 of the Board's Rules then in effect reads as follows:

> "Section 102.95. *Same: Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum, prohibited from testifying in regard thereto.*—No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer of employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of

ibits Board agents from testifying or otherwise supplying information requested in a subpoena *duces tecum* without the prior written consent of the Board.[5] Unable to obtain any satisfaction by way of a subpoena *duces tecum*, counsel for Petitioner propounded questions to the Regional Director and other agents of the Board. Virtually in every instance

> any party, to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpena, *subpoena duces tecum*, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any *subpoena ad testificandum* or *subpoena duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move, pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule."

[5] This refusal to testify was sustained even though counsel for this Petitioner suggested to the Court that the Court if it so desired, first examine the papers and rule on what was material or germane to the inquiry without opening the entire file to counsel (App. 132).

the Board's Rule regarding privilege was invoked and sustained.[7]

Without burdening the Court, perhaps it will suffice to merely quote the statement of Counsel for the Board in answer to a request of the District Court for the Board's position:

> "* * * Under the rules of our Board, Board employees are prohibited from testifying concerning matters in the file or any papers or documents, or any of their action or conduct with respect to a case, and I think that their plea of privilege should be sustained by this Court * * *.
>
> "Of course, once we allow, once we open the door to a question here, and a question there, at what point are we going to close that door? **Our position is that a Board employee may not testify without permission on any phase of the case before this Court.**" (App. 111-112.) (Emphasis supplied.)[8]

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[7] On some occasions the objection of "privilege" was coupled with a contention that the question was irrelevant and immaterial. The contention of irrelevancy and immateriality ran to the stand of the Board that no inquiry could be made into whether or not they had made their "investigation" and followed their Statements of Procedure, *i. e.*, this was privileged and accordingly immaterial.

[8] It is to be noted that counsel for the Board stated that the Regional Director could testify in answer to the sole question as to whether or not the Regional Director made an investigation. This was the extent of his testimony and counsel for the Board stated that "he (the Regional Director) is permitted to answer whether or not he made an investigation. He alleges in his petition that he made an investigation. *That is the extent to which he is permitted to answer.* It is a matter of formal pleading." (App 123.) (Italics supplied.) Apparently, it is the position of the Board that the Regional Director can answer in the affirmative that he made an investigation and this answer is per-

**The Facts: Physical Attributes—Picketing and Publicizing**

As regards the picketing, at no time was there more than one picket (App. 66, 201) and in all instances, picketing was peaceful (App. 66). The picket sign read as follows (App. 229):

"NOTICE TO THE PUBLIC.

The work being performed by the following contractors is not being done by qualified Building Trade Craftsmen.

The prevailing rate of pay and conditions are not being met.

This notice is addressed only to the general public and not to the employers or employees on the job.

George DeJong

Calumet Contractors Association

Laborers' Union #41

A. F. L.-C. I. O.

In addition to the picket sign a "handbill" was distributed by the picket on the job site (App. 56, 214). The handbill read as follows (App. 226):

"NOTICE TO THE PUBLIC.

The sole purpose of patrolling this job site is to alert the public that the work being performed is not being done by qualified Building Trades Craftsmen. It is to

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mitted because it is an allegation contained in the Petition. Beyond the bald answer of yes, he is prohibited from testifying because of Board's Rule 102.95. Under the Board's concept this would be the extent of the inquiry permitted into whether or not they had followed their Statements of Procedure—a yes or no answer as to whether they had made an investigation.

inform the public that [illegible] rate of pay and conditions are not being met [illegible] his job.

This Notice Is Addressed Only To The Public. It Is Not Addressed To Any Employers Or To Any Employees. There is no intent or attempt to induce or encourage employees of any employer to engage in a refusal to work, transport or otherwise handle or work on any goods, materials, etc. No one is requested to cease doing business with any person. There is no intent to have any particular work assigned to any one, nor is there an intent to seek recognition or to start bargaining. We believe that the people residing in this area should be familiar with what is going on and that is the sole purpose of the patrolling.

Local 41, International Hod Carriers,
AFL-CIO."

## Object of the Picketing.

At the trial, the Board introduced no evidence in support of its allegation contained in paragraph 6 (f) of the Petition that "respondent has been attempting to force Association and its members, including George Deberg, to recognize or bargain with respondent as the collective bargaining representative of their employees in the appropriate unit referred to in subparagraph (b) above." In fact, the Charging Parties themselves testified that they were not familiar with any representatives of the instant Petitioner; that Petitioner had never made a demand for recognition or to start bargaining; nor to employ members of Petitioner nor to sign a collective bargaining agreement with Petitioner (App. 58, 68, 86, 163, 164, 165). The only affirmative evidence relative to the object of picketing was introduced by Petitioner. It consisted of language on the picket signs (App. 229), the handbill distributed on the job site entitled

"Notice to the Public" (App. 226) and the testimony of the Assistant Business Manager of Petitioner (App. 199) who stated that the purpose of the picketing was not to start collective bargaining but rather to communicate to the public that the Charging Parties were not paying the prevailing wages and were not meeting prevailing working conditions (App. 203).[2] Petitioner also introduced evidence to show that at the time of an original Board representation hearing (when another union was certified, it intervened in and was not for the purpose of representing any employees or attempting to enter into any collective bargaining agreement, but rather it sought to have the representation petition dismissed on the grounds that the bargaining unit sought was inappropriate and that it would join employees of various crafts together in an overall homogeneous grouping when they were actually heterogeneous (Stipulation, App. 103).[3] The Petitioner disclaimed any interest in representing the employees and asked for the dismisal of the Petition on the grounds noted above. At no time did it engage in picketing or any other activity prior to the Board hearing and certification (App. 41, 66, 207).

[2] Even the Charging Party himself distributed the handbills to his own employees and to sub-contractors (App. 56).

[3] To the same effect see Intermediate Report of Trial Examiner, Appendix C hereto, page 14.

## REASONS FOR GRANTING THE WRIT.

### I.

### THE STATUS OF THE NATIONAL LABOR RELATIONS BOARD AS A PARTY PLAINTIFF IN THE FEDERAL DISTRICT COURT.

The instant matter affects all parties dealing with the Board who may be subjected to a Board sought injunction be they employers or unions. The considerations involved herein concern themselves with the responsibility of a governmental agency, *i.e.*, the National Labor Relations Board, to the citizens of the same government. Depending upon one's perspective as he evaluates—on the one hand, the instant matter involves important questions of federal law not heretofore determined by this Court. This Court has not had occasion to rule upon the status of the National Labor Relations Board when it brings suit in a federal court.[11] On the other hand, if one applies basic concepts as

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[11] Moreover, as applied to point II hereof, the concept of "reasonable cause" as the phrase is contained in Section 10 (l) of the Act has never been interpreted by this Court. With the tempo being increased by the National Labor Relations Board as regards seeking injunctions and with the additions to the Act granted by the Labor-Management Disclosure Act of 1959, 73 Stat. 519, 544, 29 U.S.C. 141, 169, restricting the right to engage in peaceful picketing, the question of what constitutes "reasonable cause" for the purpose of permitting the issuance of an injunction becomes even more provocative.

regards the rights and status of a governmental agency bringing suit, then it becomes clear that the decision in the instant case conflicts not only with holdings of other Circuits and of this Court, but with decisions of the Seventh Circuit as well.

The Court of Appeals in the instant case found that "the scope, conduct or extent of the preliminary investigation are not matters relevant to or material for consideration on the issue to be adjudicated on hearing of a Section 10 (l) petition . . ." (Appendix A, this Brief, page 9). It found it unnecessary "to discuss contentions made by either party concerning application of the Board's rule against disclosures by officers or employees without its consent." (Appendix A, this Brief, page 9). Yet, in *Madden v. International Organization of Masters, Mates, and Pilots of America, Inc.*, 259 F. 2d 297 (7th Cir. 1958) the same Circuit sustained a District Court's dismissal of a Section 10 (l) injunction suit because the same Regional Director refused to permit an inquiry into whether or not he had made a preliminary investigation and followed the Board's Statements of Procedure. There, the Seventh Circuit announced that the Board must comply with its Statement of Procedure and "an inquiry into such showing may not be amiss." The instant opinion states, however, that "Insofar as those remarks may in any manner indicate anything contrary to the views herein expressed they are not adhered to." Yet, the Court failed to distinguish another of its cases, *NLRB v. Brotherhood of Carpenters*, 261 F. 2d 166 (7th Cir. 1958) arising under a claimed Section 8 (b) (4) (D) violation wherein the Court stated that it was not only required to specifically consider language of the Act under which the action arose, but, in addition, the rules of the Board in effect at the time. The Court refused enforce-

ment and set the Board Order aside "Believing that the Board has not complied with 10 (k) and its own rules applicable thereto . . ." (Page 171).

It is to be noted that the instant case revolves around the general field of governmental privilege as applied to the National Labor Relations Board specifically in a Section 10 (l) injunction suit. Perhaps most significant in this field of governmental privilege is the case of *Touhy* v. *Ragen*, decided by this Court in 1951 (340 U. S. 462) and affirming the Seventh Circuit decision (180 F. 2d 321). In the *Touhy* case the government was the third party and successfully claimed privilege against production. The Seventh Circuit took great pains to distinguish the case before it; the one in which the government would be an actual party. In commenting upon cases cited by the relator in which privilege was denied, the Court said at page 325: "It appears to be the theory of such cases generally that when the government becomes a party to the suit it does so the same as any other litigant, and that it cannot occupy the analogous position of placing one point within the judicial sanctuary and leaving the other without." citing *United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Grayson*, 166 F. 2d 863 (2d Cir. 1948); *United States* v. *Krulewitch*, 145 F. 2d 76 (2d Cir. 1944); *United States* v. *Beckman*, 155 F. 2d 580 (2d Cir. 1946). In affirming the *Touhy* case, 340 U. S. 462 (1951), this Court noted a critical distinction between suits where the Government was or was not a party. At page 467 it stated: "Nor are we here concerned with the effect of the refusal to produce in a prosecution by the United States." The footnote six appearing at the end of the foregoing quotation is the Court's footnote and refers to the *Andolschek* case, 142 F. 2d 503 (2d Cir. 1944) cited by the Seventh Circuit in its opinion in *Touhy* as well. *Andolschek* involved an action

claiming a conspiracy to violate the Internal Revenue Code. The Defendants sought to have certain documents in the possession of the government—which were prosecuting this suit—introduced as evidence. The government claimed privilege under provisions similar to those relied upon by the Board in the instant case. The Court of Appeals reversed the conviction of the lower court because of the government's refusal to introduce the documents. In so doing, it merely distinguished those cases in which the government was not a party. (*Boske* v. *Comingore*, 177 U. S. 459 (1900); *Stegal* v. *Thurman*, 175 Fed. 813 (D. C. Cir. 1910); and *Ex Parte Sackett*, 74 F. 2d 922 (9th Cir. 1935). The *Touhy* case had not been decided as yet. To complete the picture, *Bankline* v. *United States*, 163 F. 2d 133 (1947) in the Second Circuit, extended what might have been considered a doctrine in criminal cases [1] to civil cases and stated that "It has been the policy of the American as well as the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies." (Page 138.)

Thus, from the standpoint of a general concept, it is clear that when a governmental agency appears as a plaintiff, it is subject to the ordinary rules governing procedure and

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[1] It is to be noted that while this doctrine, perhaps was extended to the civil field from the criminal, certain refinements such as *Gordon, et al.* v. *United States*, 344 U. S. 414 (1953) made in the criminal field are inapplicable here because of the narrow scope of the Federal Rules of Criminal Procedure as distinguished from those of Civil Procedure the position of the Board in federal district court cases to the contrary notwithstanding.

evidence. But what if this governmental agency is the National Labor Relations Board?[13] Is it not subject to the Rules of Civil Procedure?[14] Is it entitled to greater privilege than that accorded private citizens of the government? It is submitted that these questions must be answered if due process is to be extended to private litigants. If the Board has the right to seek an injunction then it would seem that the private litigant has a right to defend with all of the legitimate tools available to it, be they based upon common law or codified rules. Though the right to seek an injunction may be statutorily created, it is still extraordinary in nature; it is still in derogation of the common law. And, if by the exercise of this right a restraint issues, the impact is long felt because it is indeed alive until the final disposition of the matter by the Board. Nor does subse-

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[13] It is to be noted that the position of the Seventh Circuit also conflicts with that of the Eighth in *Mitchell* v. *Bass*, 252 F. 2d 513 (8th Cir. 1958). There, while granting privilege to the Secretary of Labor relative to the question of the secrecy of an informant, the Court nevertheless stated that when the government brings suit in an official capacity it stands "in no different position than any ordinary litigant and is, therefore, bound by the Rules of Civil Procedure in the same respect as an ordinary litigant." (Page 517, *et. seq.*).

[14] The instant matter is to be distinguished from the situation illustrated by the case of *Starr* v. *Commissioner of Internal Revenue*, 226 F. 2d 721 (7th Cir. 1955) which involved a Tax Court's refusal to modify its rules to permit discovery. The Tax Court, by express provision, is not subject to the Federal Rules of Civil Procedure and accordingly, whether or not it would permit disclosure was held to be purely discretionary with that body.

quent exoneration before the Board or a reviewing court mitigate the consequence of being enjoined. The right to seek is subject to the right to defend. The Board, apparently in a belief that its status is something different than an ordinary litigant in a court, refuses to accept the principle that private litigants have the right to utilize the Rules of Civil Procedure, to call adverse parties and to seek production and disclosure. The question then presented is whether, in fact, a private litigant has such rights when it is opposed by the National Labor Relations Board in a federal court. If such rights do, in fact, exist, then it is submitted—in view of the decision in the instant matter and the position of the Board—that such rights must be translated into a form meaningful to the private litigant where they can be utilized, in fact.

## II.

## THE INSTANT HOLDING IS IN DIRECT CONFLICT WITH OPINIONS OF THIS COURT AND OF THE SECOND CIRCUIT. IT PERMITS THE BOARD TO ACCOMPLISH BY INDIRECTION THAT WHICH THIS COURT HAS NOT PERMITTED IT TO DO DIRECTLY.

The Act involved herein establishes a statutory scheme intended to resolve, and remedy where appropriate, claimed violations of Section 8 (b) (4), A through D and the new Sections 8 (b) (7) and 8 (e), added by the Act by the amendments contained in the Labor-Management Reporting and Disclosure Act of 1959. Superfluous as this statement may be, it is clear that the Act provides for the filing of charges, investigation, the issuance of a complaint, a trial before a Trial Examiner of the Board with an ultimate determination

by the Board and the right of review in a court of appeals given to an aggrieved party. This is the Congressional plan created to remedy unfair labor practices while at the same time extending to respondents the due process protections of defending. Section 10 (l) of the Act imposes a mandatory[15] duty upon the Board to petition for "appropriate injunctive relief pending the final adjudication of the Board" if the Regional Office of the Board "has reasonable cause to believe such charge is true."[16] And in this connection, the said section provides that the parties "shall be given an opportunity to appear by counsel and present any relevant testimony." It is to be noted that Petitioner does not complain about the right of the Board to seek an injunction or the fact that it remains in effect pending final adjudication of the Board. This is the statutory scheme and we are not here raising the right of Congress to so legislate. The question is, however, whether or not by proceeding *via* the extraordinary route of the injunctive process, the Board can secure the equivalent of a cease and desist order, *i. e.*, an injunction, under circumstances where if such an order were issued by the Board itself a petition for enforcement would be denied by a court of appeals. If the injunction can only be sought upon "reasonable cause" to believe that the charge is true and if a respondent has the right to introduce evidence, is not the Board required to reasonably prove its case as regards all elements of the

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[15] It is not mandatory for the Board to seek an injunction if the claimed violation involved Section 8 (b) (4) (D) of the Act, but in the event the Board elects to do so the same procedures set forth in Section 10 (l) apply.

[16] Under Section 10 (j) of the Act, the Board in its discretion, may seek injunctive relief as regards any unfair labor practice, be it against employer or union.

claimed violation? Is it enough for the Board to show only peaceful picketing and then claim that this picketing was not only **inducement** *per se* but in addition, *per se* for the **object** proscribed by the Act. The resolution of this, of course, revolves around the interpretation of the phrase "reasonable cause" as it translates itself into the presentation of "any relevant testimony". And, it is submitted that we are not concerned here with the type of evidence which may be defined or delineated sufficiently so as to come within the "clearly erroneous and abuse of discretion" test; nor is it required that evidence be weighed and determined to be "substantial" or otherwise. The issue is whether in a Section 10 (l) proceeding, the Board must prove—at least in some fashion—that the activity complained of was for an object proscribed by the section of the Act claimed violated in order for an injunction to issue.

What transpired here? The Board obtained an injunction on June 5, 1959, and despite a subsequent finding of not guilty by a Trial Examiner of the Board, the injunction remains in effect—there has not been a final adjudication of the Board. The Board offered no proof of proscribed object at the hearing on the injunction. Its position in the trial court is best summed up in the following colloquy occurring between the Trial Court and counsel for the Board (App. 202):

> **"The Court: Well, suppose it was intended only to advise the public regarding the situation. If it had the effect of a picket line so as to prevent union men from crossing the line and going on the job, does it make any difference as to what the subjective purpose was?**
>
> **"Mr. Schurre: No, it doesn't.**
>
> **"Mr. Mamet: Now, wait a minute."**

An analysis of the Decision of the Court of Appeals indicates that its complete discussion relative to the evidence

was confined to analyzing the *inducement* aspects of a Section 8 (b) (4) (C) violation—not *object*. Thus, the Court stated (Appendix A, this Brief, Page 7) that "The manner in which picketing was conducted; the practice of the picket to remain in his car until an employee or a subcontractor or supplier arrived . . .; the picket's trips to the rear of the premises when deliveries were made there; the writing down of supplier's name . . .; and the absence of any general public distribution of handbills are all factors which preclude us from holding that the District Court was clearly in error in finding that there is reasonable cause to believe that the purpose of the picketing was such as to constitute a violation of Section 8 (b) (4) (C) . . ." It is clear that the Court of Appeals was preoccupied with whether the picketing was designed to induce persons to cease dealing with the charging party. From this, it automatically inferred that peaceful picketing was for an object proscribed by the Act and from this inference it concluded that there was reasonable cause to believe that a violation existed. Thus it merged the various alphabetical counterparts of Section 8 (b) (4)—all of which were designed to be distinguished by the *objective* and not the *means* utilized. Ignored was this Court's statement in *National Labor Relations Board* v. *International Rice Milling Company*, 341 U. S. 665, 672 (1951): "It is the object of union encouragement that is proscribed by this section [8 (b) (4)] rather than the means adopted to make it felt."[17] And, in conflict

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[17] The only evidence relative to "object" introduced at the hearing, was submitted by this Petitioner and is reflected in the Statement, pages 10 and 11 of this Brief. It is to be noted that Trial Examiner discussed "object" and found that "the appeal of the picket sign and accompanying handbill clearly disclaimed any 'intent to seek recognition or start bargaining.'" *i. e.*, the object proscribed

with the instant Seventh Circuit opinion is the Second Circuit decision in *Doud* v. *Local 50, Bakery and Confectionary Workers International Union*, 224 F. 2d 49 (1955) where the Second Circuit affirmed the refusal to grant an injunction in a claimed Section 8 (b) (4) (C) violation case because the objective of the picketing was not "'forcing or requiring" the employer to recognize Local 50 as the bargaining representative of the employees which is the object forbidden by clause (C)" (page 51). The Second Circuit expressed skepticism as to the union's announced objective of its peaceful picketing, but skepticism or not, the Court held that the Board had not demonstrated that the objective of the picketing was specifically proscribed by the Act.

The Act has now been amended and additional prohibitions regarding peaceful picketing have been added with the same references to the mandatory injunction provisions of the Act. It appears clear that as additional ground rules are interpreted concerning the permissibility of the objective of peaceful picketing, the district courts will be confronted with an increased number of applications for injunctions sought by the Board. The case of *NLRB* v.

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by Section 8 (b) (4) (C) of the Act, the Section claimed to be violated herein. Not without significance is the fact that the action for injunction commenced with the Board's securing an *ex parte* Rule to Show Cause as to why an injunction should not issue. Although, counsel for the Board stated during the course of the trial that the Board had the burden of proof, it is clear that the uniform utilization of a Rule to Show Cause by the Board is indicative of its belief that the position it takes in injunction suits—irrespective of the proof—should automatically give rise to an injunction and that the burden of overcoming same, if at all, rests upon a respondent.

*Drivers, Chauffeurs, and Helpers Local Union etc.*, 362 U. S. 275 (1960) reflects the Board's attempt to extend Section 8 (b) (4) (A) of the Act to cover peaceful picketing situations and this Court's refusal to accept such attempted extension. Similarly in *NLRB* v. *Insurance Agents International Union* 361 U. S. 477 (1960) this Court noted that "It is quite another matter . . . to say that the Board has been afforded a flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful. Congress has been rather specific when it has come to outlawing particular economic weapons on the parts of unions." These cases make it clear to the instant Petitioner that enforcement of Board orders will be denied if they are not supported by proof of objective or if, in the "sensitive area of peaceful picketing" the Board goes beyond dealing "explicitly with (the) isolated evils" Congress expressly included in its legislation (*Insurance Agents, supra*). But, if a union can be enjoined from engaging in peaceful picketing without the Board showing proof, *i.e.*, "reasonable cause", as to the proscribed objective, then even if enforcement on the merits is subsequently denied, the due process protections of the right to defend extended to a respondent becomes moot and particularly if a construction project is involved where the dispute may well end with the enjoining of peaceful picketing.

It is submitted that the reasons for granting this writ revolve around practical considerations, serious indeed to labor and management whose views, though not diametri-

cally opposed, sometime conflict, thus involving the intervention of a governmental agency. From the standpoint of the labor practitioner engaged in the practice at grass root levels, it is clear that the Board is not particularly interested in the ultimate determination of the merits of a dispute if it can first obtain an injunction. It may be two years or more before a final adjudication of the Board occurs—here fourteen months have already elapsed—and obviously, if an enforcing agency is interested in achieving enforcement based upon its concepts of the law, then an ultimate reversal on the merits, while perhaps embarrassing, does not result in disturbing the effect of the original enforcement. If individuals are given the right to bargain collectively and if they may additionally protect these rights through other concerted activities subject to certain proscriptions created by law, then it would appear that whatever rights remain to be exercised, should be permitted to be exercised in a fashion compatible with hard practical facts. If a union can engage in peaceful picketing except for objects proscribed by the Act, then it is submitted that in seeking 10 (l) injunctions the Board should be required to reasonably prove that the peaceful picketing was for the object so proscribed. If this Court has decreed that the Board has not been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful, then it is submitted that the Board must comply with this directive and not seek to accomplish indirectly, *via* the injunctive process, that which this Court has ordered cannot be done through Board decision and subsequent attempted enforcement.

## CONCLUSION.

For the reasons stated herein, it is respectfully requested that a writ of certiorari be granted.

Respectfully submitted,

BERNARD M. MAMET,
Suite 1326,
327 South La Salle Street,
Chicago 4, Illinois,
HArrison 7-7630,
*Attorney for Petitioner.*

Dated at Chicago, Illinois,
August 5, 1960.

# APPENDICES

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# APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12743

Ross M. Madden, Regional Director, etc.,
*Petitioner-Appellee,*

v.

International Hod Carriers' Building and Common Laborers' Union of America, Local No. 41, AFL-CIO,
*Respondent-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

May 11, 1960

Before HASTINGS, *Chief Judge*, DUFFY and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* This is an appeal from an order of the District Court granting temporary injunctive relief against the respondent-appellant Union.[1] The order re-

[1] International Hod Carriers', Building and Common Laborers' Union of America, Local No. 41, AFL-CIO. Referred to herein as Union.

strained picketing pending final disposition of an unfair labor practice proceeding before the National Labor Relations Board in which it was charged that the picketing violated Section 8 (b) (4) (C) of the National Labor Relations Act, 29 U.S.C.A. §158 (b) (4) (C).

The order was entered following a hearing on a petition invoking the District Court's jurisdiction under Section 10 (l) of the National Labor Relations Act, 29 U.S.C.A. 160 (l) and filed on behalf of the National Labor Relations Board by petitioner-appellee, Regional Director of its Thirteenth Region. The petition alleged, *inter alia*, that the Board had investigated the unfair labor practice charge and "upon the basis of the evidence disclosed as a result of such investigation, petitioner has reasonable cause to believe, and believes, that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8 (b) (4) (C) of the Act".[1]

The Union's appeal presents two main issues:

> 1. Whether on the evidence adduced on the hearing before it the District Court was clearly erroneous in finding and concluding that there is reasonable cause to believe that the picketing had induced and encouraged employees to engage in concerted refusals to perform services, and that an object thereof was to force or require any employer to recognize or bargain with the Union as representative of his employees although another labor organization was the representative of such employees certified by the Board, and
>
> 2. Whether the District Court erred in refusing to permit inquiry by the Union into the scope, nature and extent of the Board's preliminary investigation.

In resolving each of these issues we must be guided by the fundamental proposition, expressly recognized in the language of Section 10 (l),[2] that the parties be given opportunity to present "any *relevant* testimony",[3] and the

---

[2] All statutory references herein are to the National Labor Relations Act, as amended.

[3] Emphasis supplied.

further consideration that in a Section 10 (l) adjudication it is not the function of the District Court to determine whether, in fact, an unfair labor practice has been engaged in, but only if reasonable cause exists to believe such violation occurred.

The injunctive relief provided for in Section 10 (l) is interlocutory to a final disposition by the Board of the unfair labor practice charge. The ultimate determination on the merits as to whether a violation occurred is reserved exclusively for the Board, subject to judicial review by the Court of Appeals.

In *Madden* v. *International Organization of Masters, Mates & Pilots of America, Inc.*, 7 Cir., 259 F. 2d 312, 315, certiorari denied 358 U. S. 909 we pointed out in this connection:

> "In this appeal by respondents from the order below granting an interlocutory injunction, they could not have cast their nets more widely, for they misconstrue the functions of the district judge when he is passing upon a petition for temporary relief under § 10 (l). By its express terms that provision is aimed at an injunction *pendente lite i. e.*, pending the final adjudication of the Board based upon its hearings; subsequently judicial review at the Court of Appeals level comes into play. Congress has expressly authorized district courts to grant temporary injunctive relief pending administrative decision. Clearly a district judge proceeding under § 10 (l), as here, looks to the statutory yardstick of 'reasonable cause' required as the basis for the petition and he is certainly not deciding which party, petitioner or respondent, is ultimately to prevail, nor do we now. In this incipient stage the district court was asked to aid the Board by preserving the status quo until it could ascertain by hearings, whether it had statutory jurisdiction, and if unfair labor practices existed. We, on the other hand, are simply reviewing discretion exercised below in a § 10 (l) setting. *Douds* v. *Milk Drivers and Dairy Employees Union*, 2 Cir., 1957, 248 F. 2d 534, 537. The finding of reasonable cause is not clearly erroneous under Rule 52, Federal Rules of Civil Procedure, 28 U.S.C., and respondents by their motions admitted all facts well pleaded in Madden's petition."

And, as then Chief Judge Duffy so aptly observed in *Cosentino* v. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al.*, 7 Cir., 265 F. 2d 327, 330, 331:

> "Section 10 (1) expresses the determination of Congress that unfair labor practices proscribed by Section 8 (b) (4) (A) gave, or tended to give, rise to such serious interruptions to commerce as to require their discontinuance, pending adjudication by the Board.
>
> The injunctive relief contemplated in Section 10 (1) is interlocutory and is limited to such time as may expire before the Board's final disposition of the unfair labor practices charged. In order to justify such relief, there must be a finding by the District Court that there is reasonable cause to believe that a violation of the Act as charged, has been committed and that equitable relief would be just and proper. The District Court made such findings. On this appeal this Court is not called upon to decide whether in fact the charges are true."
>
> • • •
>
> "In equity suits a district judge has a wide discretion to issue or withhold a temporary injunction and ordinarily an appellate court will not interfere. *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, 7 Cir., 191 F. 2d 744. The section we are considering provides: '• • • the district court shall have jurisdiction to grant such injunctive relief • • • as it deems just and proper, notwithstanding any other provision of law • • •.' Such a grant of power by Congress to a district judge is a very broad one limited only by the exercise of sound legal discretion. *Schauffler* v. *United Association of Journeymen, etc.*, 3 Cir., 218 F. 2d 476, 480."

The petition for temporary injunctive relief in the instant case was predicated on a charge filed with the Board on April 1, 1959 by George DeJong and the Calumet Contractors Association alleging that the Union had and was engaged in unfair labor practices proscribed by Section 8 (b) (4) (C). From the record it appears that in 1958 the Christian Building Trades Local 12, Christian Labor

Association of the United States,' following a representation election held after it petitioned the Board under Section 9 (c) of the Act, was certified by the Board as collective bargaining representative for 'all journeymen and apprentices, laborers, machine operators and truck drivers" employees of members of the Association. The Union had opposed the petition of Local 12. In the fall of 1958 DeJong, a member of the Association, was awarded a contract for the erection of a church building in a residential section of Hammond, Indiana. As general contractor he retained the carpentry and labor work, but subcontracted all the other work involved. Work on the project started the last week of October, 1958. On November 3, the Union commenced picketing the construction site. The picket sign claimed, in substance, that the masonry subcontractor was not performing his work with qualified craftsmen or paying prevailing wages. The next day the names of DeJong and the Association were substituted for the masonry subcontractor. The picket sign after the change read:

NOTICE TO PUBLIC
The work being performed
by the following contractors
is not being done by qualified
BUILDING TRADES
CRAFTSMEN
The prevailing rate of pay & conditions
are not being met
This notice is addressed only to
the general public & not to the
employers or employees on the job
GEO. DEJONG &
EMPLOYER MEMBERS OF THE
CALUMET CONTRACTORS ASS'N
LABORS UNION #41
A.F. of L. - C.I.O.

Work on the project was suspended and due to inclement weather commencing the latter part of November, DeJong did not attempt to resume work at the site until

March 12, 1959. The Union's picketing with the sign continued thereafter. The picket also carried handbills for distribution which read:

> Notice to the Public.
>
> The sole purpose of patrolling this job site is to alert the public that the work being performed is not being done by qualified Building Trades Craftsmen. It is to inform the public that the prevailing rate of pay and conditions are not being met on this job.
>
> This Notice Is Addressed Only to the Public. It Is Not Addressed to Any Employers or to Any Employees. There is no intent or attempt to induce or encourage employees of any employer to engage in a refusal to work, transport or otherwise handle or work on any goods, materials, etc. No one is requested to cease performing any services. No one is requested to cease doing business with any person. There is no intent to have any particular work assigned to any one, nor is there an intent to seek recognition or to start bargaining.
>
> We believe that the people residing in this area should be familiar with what is going on and that is the sole purpose of the patrolling.
>
> Local 41, International Hod Carriers, AFL-CIO

The Union contends that the object of its picketing was not to seek recognition or bargaining rights as representative of DeJong's employees or to induce them or others not to perform services but "to show the public that the prevailing scale of wages and conditions are not being met". There was evidence, however, that the picket usually sat in his car until an employee of a subcontractor or supplier arrived at the site, at which time he began patrolling with his sign. The record discloses that the picketing did have the effect of stopping work by employees of subcontractors and the delivery of supplies by suppliers. Wynkoop, the Union's president and assistant business agent, admitted that except for discussions at union meetings no effort was made to bring public attention to the alleged substandard wages and conditions other than the

picket's activities at the construction site. He testified to the effect that it was the position of the Union that its negotiated wage scale should have uniform force throughout the community; that it wanted others to be paid this "prevailing" wage scale as a minimum; didn't know why there should be any exception; and that any labor organization should receive the prevailing wage rate.

On the basis of the record before us we can not say that it was "clearly erroneous" for the District Court to find and conclude that there is reasonable cause to believe that the Union was violating Section 8 (b) (4) (C). The evidence need not establish a violation. It is sufficient to sustain the District Court's finding and conclusion if there be any evidence which, together with all the reasonable inferences that might be drawn therefrom supports a conclusion that there is reasonable cause to believe that a violation had occurred.

The manner in which the picketing was conducted; the practice of the picket to remain in his car until an employee of a subcontractor or supplier arrived to enter the site, then to commence patrolling; the picket's trips to the rear of the premises when deliveries were made there; the writing down of supplier's names in the presence of the supplier's employees; and the absence of any general public distribution of the handbills are all factors which preclude us from holding that the District Court was clearly in error in finding that there is reasonable cause to believe that the purpose of the picketing was such as to constitute it a violation of Section 8 (b) (4) (C), rather than the ostensible appeal to the public proclaimed by the [illegible] handbills and self-serving [illegible] protestation.

It has been [illegible] that picketing "may induce action [illegible] one kind or another, quite irrespective of the nature of the ideas which are to be disseminated". *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 776, and "is more potent [illegible] for inducing action or inaction than the message the pickets convey". *Building Service Employees Union v. Gazzam*, 339 U. S. 532, 537. It is well known "[illegible] means of enlisting the support of employees. *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*, 354 U. S. 284, 293. "The relative effectiveness of workers [illegible] picket line [illegible]". *Plumbers Union v. Graham*, 345 U. S. 192, 195. *Local Union No. 10 v. Graham*, 345 U. S. 192, 195.

Cir., 171 F. 2d 331, 334. It can hardly be characterized as clear error for the District Court, pending Board determination of the question of violation after full hearing on the merits, to ascribe to the Union the intent and purpose to bring about the natural consequences of its acts. And there is evidence to support a conclusion that there is reasonable cause to believe that an object of the picketing was to compel DeJong and other contractor members of the Association to adhere to rates and conditions negotiated by the Union rather than those agreed to by Local 12 as certified bargaining representative of employees of members of the Association. That the attempt may have been indirect does not save it from the proscriptions of Section 8 (b) (4) (C).

The remaining issue stems from the Union's contention that the District Court's refusal to require the Board's agents to testify concerning the scope, nature and extent of its preliminary investigation and to produce for examination the files and records pertaining to the conduct of the investigation constituted reversible error.

It appears from the record that a copy of the charges filed with the Board were promptly served on the Union; that the Board took a statement from the Union's representative, Wynkoop, and interviewed other persons prior to filing the petition for injunctive relief. The Regional Director, subpoenaed by the Union, testified that the charge was assigned for investigation, and was investigated under his supervision; that letters were sent to the Union requesting its position in writing; that persons assigned to the case interviewed witnesses of the charging party and offered to interview "any witnesses" of the Union. He was not required, however, to answer questions concerning the conduct or extent of the investigation, or concerning his decisional processes. Other Board agents subpoenaed by the Union also testified but were not required to answer questions regarding the conduct or extent of the investigation.

It is our opinion that the scope, conduct or extent of the preliminary investigation are not matters relevant to or material for consideration on the issue to be adjudicated on hearing of a Section 10 (l) petition, *i. e.*, whether reasonable cause exists to believe a violation has occurred

This issue is to be resolved by the evidence adduced by the Board in open court to sustain its petition. The Board is enjoined to make a preliminary investigation but the adequacy of the investigation is judicially tested only by the Board's subsequent ability to sustain its initial determination that the investigation disclosed reasonable cause to believe that a violation occurred.

The Union relies on observations made in *Madden* v. *International Organization of Masters, Mates and Pilots of America, Inc.*, 7 Cir., 259 F. 2d 297 as to concessions made by the Board in connection with its motion to dismiss its appeal from a district court's determination denying it injunctive relief under Section 10 (l), in which motion the Board cited its own failure to conform with its Statements of Procedure in making the Section 10 (l) preliminary investigation. The Union relies on these observations as constituting holdings that the preliminary investigation is a jurisdictional condition precedent to a Section 10 (l) petition for temporary relief, and that an inquiry by the respondent into the scope and conduct of the Board's investigation in a Section 10 (l) proceeding is a matter of right. We do not regard the remarks in *Madden* v. *International Organization of Masters, Mates and Pilots of America, Inc.*, 7 Cir., 259 F. 2d 297 as constituting such adjudications. And, insofar as those remarks may in any manner indicate anything contrary to the views herein expressed they are not adhered to.

We do not deem it necessary to discuss contentions made by either party concerning application of the Board's rule against disclosures by officers or employees without its consent. What we said in *Starr* v. *Commissioner of Internal Revenue*, 7 Cir., 226 F. 2d 721, 723, 724 is pertinent:

> "We do not reach the question whether under any circumstances a special agent of the Intelligence Unit of the Treasury Department can be compelled to disclose the manner in which he conducted an investigation and to produce papers and documents that he may have obtained. It is apparent from the statement of taxpayer's counsel to the Court indicating the testimony which he sought to elicit from the agents, that such evidence was neither relevant nor material to the issues in this case. Of what moment was it that

the agent may have made an investigation as to the taxpayer's net worth? True it is that in many cases where direct testimony is unavailable, the Commissioner may be required to rely upon the net worth theory to show the existence of income. However, in the case at bar, the Commissioner was relying upon direct testimony as to the assets, source and amount of unreported income".

The testimony sought to be elicited and the files and records sought to be produced by the Union through motions, subpoenas *duces tecum* and questions were not relevant and the District Court did not err in refusing to require the Board's agents to answer the questions or produce the files and records.

The order of the District Court is affirmed.

A true copy:

Teste:

*Clerk of the United States Court of Appeals for the Second Circuit*

# APPENDIX B

## UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF INDIANA
## HAMMOND DIVISION

Ross M. Madden, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,

*Petitioner,*

v.

International Hod Carriers', Building and Common Laborers' Union of America, Local No. 41, AFL-CIO,

*Respondent.*

Civil No. 2506

### ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Ross M. Madden, Regional Director of the Thirteenth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10 (l) of the National Labor Relations Act, as amended (hereinafter called the Act), pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why an injunction should not be granted as prayed for in said petition. The Court has considered the pleadings, evidence, briefs, arguments of counsel and the entire record in this case and has made and filed its Findings of Fact and Conclusions of Law; and it appearing therefrom to the satisfaction of the Court that there is reasonable cause to believe that respondent has engaged in, and is engaging in, acts and practices in violation of Section 8 (b) (4) (i) of the Act,

affecting commerce within the meaning of Sections 2 (6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined,

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters pending before the National Labor Relations Board, respondent International Hod Carriers', Building and Common Laborers' Union of America, Local No. 41, AFL-CIO, its officers, representatives, agents, servants, employees, attorneys and all members and persons acting in concert or participation with it, be, and they hereby are, enjoined and restrained from:

(a) Picketing at or in the vicinity of the construction site of the Hammond Reformed Christian Church in Hammond, Indiana.

(b) By any means, including picketing, orders, instructions, directions, requests, appeals, or by any like or related acts or conduct, or by permitting any such to remain in existence or effect, engaging in, or inducing or encouraging the employees of George DeJong, Association, or of any other employer, to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is to force or require Calumet Contractors Association or any of its members to recognize or bargain with respondent, or any other labor organization, as the collective bargaining representative of any of the employees in the unit for which Christian Building Trades Local 12, Christian Labor Association of U. S., is the certified representative.

Enter:

LUTHER M. SWYGERT,

*United States District Judge.*

Dated: June 5, 1959
Hammond, Indiana

UNITED STATES DISTRICT COURT

* * (Caption—2596) * *

JUDGMENT ON THE MANDATE.

The mandate from the Court of Appeals, having been filed, showing order of this court entered June 5, 1959 affirmed,

Judgment is now entered on the mandate.

LUTHER M. SWYGERT,

*Judge.*

# APPENDIX C.

| | |
|---|---|
| International Hod Carriers, Building and Common Laborers Union of America, Local No. 41, AFL-CIO<br>and<br>Calumet Contractors Association and George DeJong. | Case No. 13-CC-202. |

Herbert L. Borovsky and Lawrence E. Doppelt, for the General Counsel of the National Labor Relations Board.

Thomas J. McGrath, of Chicago, Ill., for Calumet Contractors Association and George DeJong.

Bernard M. Mamet and Daniel S. Shulman, of Chicago, Ill., for above-named Union.

Before:

Albert P. Wheatley, Trial Examiner.

## INTERMEDIATE REPORT AND RECOMMENDATIONS

### Statement of the Case.

This proceeding was heard before the undersigned Trial Examiner in Chicago, Illinois, on April 5 and 6, 1960. The sole issue litigated was whether International Hod Carriers, Building and Common Laborers Union of America, Local No. 41, AFL-CIO (herein called Respondent or Respondent Union) violated Section 8(b)(4)(C) of the National Labor Relations Act, as amended (herein called the Act).[1] As

[1] Section 8(b)(4)(C) provides: It shall be an unfair labor practice for a labor organization or its agents . . . (4) (i) to engage in, or to induce or encourage any individual . . . to engage in, a strike or a refusal in the course

the hearing the General Counsel and the Respondent filed briefs which the undersigned has considered.

Upon the entire record and observations of witnesses the undersigned makes the following:

## Findings and Conclusions.

### The Business Involved.

Calumet Contractors Association is an association composed of general contractors and subcontractors who are engaged in the building and construction industry, in the vicinity of Hammond, Indiana. In the course and conduct of their business operations the Association's members, annually, purchase over $50,000 worth of materials and supplies which are shipped to said members in the State of Indiana from points outside of said State.

George DeJong is a general contractor and a member of the Calumet Contractors Association. His principal office is located in Lansing, Illinois. In the course and conduct of his busines operations during 1958 DeJong rendered services outside of Illinois valued at approximately $50,000.

No jurisdictional issue is involved herein. The evidence adduced reveals that the above-mentioned employers are engaged in business affecting commerce within the meaning of Section 2(6) of the Act and that the Board's requirements for the assertion of jurisdiction have been satisfied.

### The Labor Organizations Involved.

Respondent and Christian Building Trades Local 12, Christian Labor Association of U. S. are labor organizations within the meaning of Section 2(5) and Section 8(b)(4)(C) of the Act.

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of his employment to use, manufacture, process . . . or work on any goods . . . or to perform any services; or (ii) to threaten, coerce or restrain any person . . . where in either case an object thereof is: . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees. . . .

## The Alleged Unfair Labor Practices.
### Issue.

On August 5, 1958, Christian Building Trades Local 12, Christian Labor Association of the U. S. (herein called Local 12) was certified by this Board as the collective bargaining representative for the following employees of the Calumet Contractors Association:

> All employees of the employer in Indiana and Illinois, including craft journeymen and apprentices, laborers, machine operators, and truckdrivers; but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

In the fall of 1958 George DeJong, was awarded a contract to erect a church in Hammond, Indiana. About the same time that construction commenced Respondent commenced picketing the construction site. The issue herein is whether an object of this picketing was forcing or requiring the Calumet Contractors Association and its members, including George DeJong, to recognize or bargain with Respondent as the representative of the employees in the unit set forth above in the face of the certification previously mentioned.[2]

### The Facts.

In April 1957 Local 12 filed a petition with the Board seeking to be certified and designated as the collective bargaining representative for the employees in the unit set

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[2] The complaint alleges that the picketing induced and encouraged employees of George DeJong, the Association, and of other employers to engage in a strike or concerted refusal to work or handle goods and materials and that an object of said picketing was to force or require the Association and its members, including George DeJong, to recognize and bargain with Respondent "as the representative of the Association's employees within the certified unit [set forth above], notwithstanding the fact that Local 12 has been, and is, certified as the exclusive bargaining representative of such employees" and that by the picketing Respondent violated Section 8(b)(4)(C) of the Act.

forth above. During the course of the representation proceedings Respondent intervened for the limited purpose of contesting the appropriateness of the unit and contended that the unit was inappropriate on the grounds that (1) it is not supported by a multiemployer bargaining history and (2) it would join various building trade craftsmen in the same unit. Respondent disclaimed any interest in representing the employees involved and asked for dismissal of the petition on the grounds noted above. The Board rejected Respondent's contentions (see Direction of Election in Case No. 13-RC-5479) and, as noted above, subsequently (on August 5, 1958) certified Local 12.

In the fall of 1958 George DeJong was awarded a contract to erect a church in Hammond, Indiana. The construction site was at 167th Street and Bering Avenue in Hammond which was across from the Woodmar Shopping Center—a large shopping area directly across the street from the construction site. The shopping center's exit driveway was so located that a patron leaving the shopping center would be facing the construction site. Construction of the church commenced on October 28, 1958. It was completed in August 1959.[3] George DeJong performed the carpentry work with his own employees and the specialized work, such as masonry and plumbing, through subcontractors.

On November 3 or 4, 1958, Respondent commenced picketing the construction site. Thereafter, the picketing occurred Monday through Friday, from 8 a. m. to 4:30 p. m., until June 5, 1959, and was at all times peaceful picketing by "one-man picket." The legnd on the picket sign read:

---

[3] During the winter months work was suspended, in the main, because of inclement weather.

NOTICE TO PUBLIC

The work being performed by the following contractors is not being done by qualified

BUILDING TRADES CRAFTSMEN

The prevailing rate of pay & conditions are not being met This notice is addressed only to the general public & not to the employers or employees on the job

GEO. DeJONG,&
EMPLOYER MEMBERS OF THE
CALUMET CONTRACTORS ASS'N
LABORS UNION #41
AFL-CIO

In addition a "hand bill" was distributed.[1] The handbill reads as follows:

Notice to the Public.

The sole purpose of patrolling this job site is to alert the public that the work being performed is not being

---

[1] George DeJong testified that he did not observe the picket distributing the handbills but that upon request the picket gave him (DeJong) copies which he (DeJong) distributed to his own employees and to subcontractors and that the plumbing contractor distributed the handbill among his employees. General Counsel witnesses Joseph Van Keppel and Gilbert Lyzenga testified they were at the construction site on several occasions but that they never observed the picket passing out handbills. General Counsel witness Virgil Wynecoop (president of Respondent) testified that he saw the picket distribute 15 or 20 handbills and testified further in such a manner as to leave an inference that the picket distributed several hundred of these handbills.

done by qualified Building Trades Craftsmen. It is to inform the public that the prevailing rate of pay and conditions are not being met on this job.

This Notice Is Addressed Only to the Public. It Is Not Addressed to Any Employer or to Any Employees. There is no intent or attempt to induce or encourage any employees of any employer to engage in a refusal to work, transport or otherwise handle or work on any goods, materials, etc. No one is requested to cease performing any services. No one is requested to cease doing business with any person. There is no intent to have any particular work assigned to anyone, nor is there an intent to seek recognition or to start bargaining.

We believe that the people residing in this area should be familiar with what is going on and that is the sole purpose of the patrolling.

Local 41 International Hod Carriers, AFL-CIO

Joseph Van Keppel testified that on March 18, 1959, when a plumber and helper from Hilbrich & Connor (a plumbing contractor) arrived at the construction site the picket got out of his car and put on his sign and talked to the plumber. Van Keppel did not overhear the conversation. It is not clear from Van Keppel's testimony (which is the only evidence concerning this matter) what happened next. Apparently the picket returned to his post, the plumbers left the jobsite and then returned in about 45 minutes and picked up their tools and again left the jobsite.

Van Keppel testified that on March 19, when a delivery truck parked near the rear of the construction site the picket went from the front of the site to the rear and made notes on a pad of paper (apparently copied the name from the side of the truck). The truckdriver offered to supply to the picket his (the truckdriver's) name but the picket said that was not necessary he (the picket) "could find that out anyway." Thereafter the truckdriver unloaded his truck at the construction site.

On March 23, 1959, the same plumbers who had appeared at the jobsite on March 18, returned. Although the picket

was there, the plumbers went to work. Following the lunch hour a car drove up to the jobsite and one of the occupants (the occupants were not from Respondent Union) talked to the plumber. The record does not reveal what was said. Immediately thereafter the plumbers left the jobsite.

On March 25, 1959, the concrete floor slab contractor's employees arrived to perform work. These employees, some of whom were members of Respondent Union, asked Respondent's president, who was parked in the shopping center, what they should do about going through the picket line and were told that it was their prerogative to go through. Upon further inquiry these employees were told that they would not be fined or punished or penalized in any respect if they crossed the picket line. Later that morning one of the officials of the concrete floor slab contractor asked Respondent's president "What's going to happen if my men go through that picket line?" and was told "Absolutely nothing. That's their prerogative. If they want to go through that picket line, they can go." Immediately after this conversation the official from the concrete floor slab contractor told DeJong "they would not be able to make the deliveries" and then the employees of this contractor left the jobsite.

The evidence with regard to picketing and to the incidents heretofore outlined is the only reliable evidence in this record tending to establish "inducement or encouragement" as those terms are used in Section 8(b)(4) of the Act.

At the hearing in this matter it was stipulated that "at no time did Local 41 [Respondent herein] make a written or oral request or demand to be recognized or to be bargained with as the representative of the employees of George DeJong, the Calumet Contractors' Association, or any of the members of said association for the bargaining unit covered by the complaint in this case or for any other bargaining unit." George DeJong and Respondent Union's president testified to a similar effect—that no demands for recognition, to start bargaining, to sign a collective bargaining agreement or to employ members of Respondent Union were made by Respondent Union.

## Conclusions.

Assuming, *arguendo*, that the conduct outlined above constitutes inducement or encouragement within the meaning of Section 8(b)(4) of the Act the question for determination herein is whether the object of such conduct was "forcing or requiring the Calumet Contractors Association and its members, including George DeJong to recognize or bargain with Respondent Union. . . ." If so, a violation of Section 8(b)(4)(C) of the Act has been established; otherwise, it has not been proved.[5]

It is apparent that Respondent's conduct had as an object the securing of rates of pay and other conditions of employment—matters normally sought through collective bargaining. However, the mere fact that such matters are normally obtained as a result of collective bargaining does not mean that this is the only avenue available for such purposes and the section of the Act under consideration does not proscribe conduct aimed at securing rates of pay or other conditions of employment. It proscribes forcing or requiring an employer to enter into bargaining relations with or dealings with a particular union despite the fact that another labor organization is the certified representative for the purposes of collective bargaining. In the instant matter Respondent was not seeking recognition and was not attempting to usurp some or all of the functions of Local 12 (the exclusive bargaining representative). From the evidence adduced it could be argued that Respondent was attempting to aid rather than infringe upon Local 12's rights. Assuming, however, that the normal, foreseeable result of picketing is to induce a willingness or readiness on the part of an employer to grant recognition such normal, foreseeable consequence is a rebuttable presumption (*Radio Broadcast Technicians WKRG-TV*, 123 NLRB No. 55) and the evidence adduced herein establishes that the presumption has been rebutted. Throughout the course of this matter, in-

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[5] The sole issue litigated was whether Respondent violated Section 8(b)(4)(C) and there is no issue before the undersigned as to whether the aforementioned conduct was violative of any other section of the Act.

cluding the prior representation case, Respondent disclaimed any interest in representing the employees involved and informed the parties, the public, the employees involved, and agencies of the United States Government that it was not seeking recognition or bargaining rights. The only evidence indicative of a desire to meet with and deal with the employer or employers involved herein is the fact of picketing. However, the appeal of the picket sign and the accompanying handbill clearly disclaim any "intent to seek recognition or to start bargaining."

In view of the foregoing, it is believed that the complaint, in its entirety, should be dismissed.

## RECOMMENDATIONS.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein, the undersigned recommends that the complaint in this matter be dismissed.

It is further recommended that, unless on or before twenty (20) days from the receipt of this Report a statement of exceptions is filed in accordance with the Rules and Regulations of this Agency, the National Labor Relations Board adopt the findings, conclusions, and recommendations herein contained.

Dated at Washington, D. C., this 14th day of June 1960.

ALBERT P. WHEATLEY,
*Trial Examiner.*

## APPENDIX D.

The relevant provisions of the Board's Statements of Procedure in effect at the time of the filing of the Petition for Injunction, are as follows:

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SECTION 101.4. *Investigation of charges.*—When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director will, on request of the charging party, and may in any case cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10 (b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit evidence in its support. The person against whom the charge is filed, hereinafter called the respondent, is asked to submit a written statement of his position in respect to the allegations. The case is then assigned to a member of the field staff for investigation, who interviews representatives of all parties and those persons who have knowledge as to the charges. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8 (b) (4) (A), (B), and (C) are given priority over all other cases in the office in which they are pending except cases of like character, and charges alleging violation of section 8 (b) (4) (D) are given priority over all cases except section 8 (b) (4) (A), (B), and (C) cases and other cases alleging violation of section 8 (b) (4) (D). The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceedings, and the public interest. After full investigation, the case may be disposed of through informal

methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

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SECTION 101.7. *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.